

William W. Milks
Law Office of William W. Milks
American Savings Bank Tower
Suite 977, 1001 Bishop Street
Honolulu, HI 96813
Tel: (808) 526-3923
Fax: 1 (808) 441-0056
E-mail: energylaw@hawaii.rr.com
Attorney for West Molokai Association

PUBLIC UTILITIES
COMMISSION

2010 FEB 10 P 3:45

FILED

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application)	DOCKET NO. 2009-0048
)	
MOLOKAI PUBLIC UTILITIES, INC.)	WEST MOLOKAI ASSOCIATION'S
)	MEMORANDUM OF POINTS AND
For review and approval of rate increases;)	AUTHORITIES IN OPPOSITION TO
revised rate schedules; and revised rules.)	MOLOKAI PUBLIC UTILITIES, INC.'S
)	MOTION TO DISMISS COUNTY OF MAUI
)	AS AN INTERVENOR; CERTIFICATE OF
)	SERVICE

**WEST MOLOKAI ASSOCIATION'S MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO MOLOKAI PUBLIC UTILITIES, INC.'S
MOTION TO DISMISS COUNTY OF MAUI AS AN INTERVENOR.**

On February 3, 2010 Molokai Public Utilities, Inc. ("Applicant" or MPUI, herein) filed a Motion to Dismiss the County of Maui as an Intervenor in the above-captioned proceeding.

West Molokai Association ("WMA") is a party to this proceeding and opposes Applicant's Motion to Dismiss an intervenor. WMA files this Memorandum of Opposition pursuant to Section 6 H.A.R. 61-41.

In support of its Motion, Applicant alleged there is good cause for dismissal of the County of Maui ("COM" or "County," herein), due to numerous failures on COM's part, to date, to contribute to this investigative process. WMA opposes the Motion because the purported good cause for this Motion is unfounded in fact, and the Motion is premature and speculative.

1.0 INSUFFICIENT CAUSE FOR DISMISSAL OF COUNTY REQUIRES THAT THE MOTION BE DENIED.

On January 19, 2010 the Commission issued an Order in this proceeding dismissing “Stand For Water” as an Intervenor. In its Order, the Commission delineated six specific failures on SFW’s part to conform to specific directives of the Commission. In all instances, the failures of SFW were breaches of conditions the Commission imposed on all Intervenor, when it granted party status to SFW, COM, and WMA, in its October 16, 2009 Order.

The actions and failures to act by COM are legally distinguishable from the failures of SFW. SFW failed to adhere to Commission-imposed conditions; in contrast, COM is in compliance with the Commission’s conditions, albeit without fulfilling MPUI’s apparent expectations. COM was under no legal obligation to provide direct testimony, and its failure to do so was discretionary with the County. The causes for its failure to file testimony are unknown, but may have been attributable, in part, to MPUI’s non-responsive answers to COM’s Information Requests.

MPUI further alleges that COM has failed to adhere to the issues in this proceeding, attempting to broaden the issues. Notwithstanding County’s attempt to re-state certain issues, the issues in this case have not been broadened and remain exactly as the Commission ordered. In summary, MPUI’s Motion fails because MPUI has failed to show good cause for the dismissal.

2.0 MPUI’S ALLEGED BASES FOR THE MOTION TO DISMISS A PARTY ARE SPECULATIVE.

MPUI’s memorandum in support of this motion is replete with speculation as to what the County may or may not do, prospectively. While County’s efforts in this proceeding, to date, may have fallen short of MPUI’s expectations, County’s status as a party does not preclude

productive settlement discussions, or for COM to otherwise perform in a contributory fashion at the evidentiary hearing. Similarly, the absence of testimony by County of Maui provides MPUI with compelling arguments at the evidentiary hearing – but not at present – and does not place MPUI in a “very awkward and difficult position.” County of Maui’s shortcomings to date effectively ensure that County of Maui will be less effective as an Intervenor than it might otherwise have been, but fairness dictates that County remain as a party.

The Commission is in full control of the evidentiary hearing process. MPUI’s anticipated need to recess the evidentiary hearing in order to enable MPUI to gather evidence to rebut what COM may reveal on cross-examination is pseudo fear-mongering at this point in time.

3.0 MPUI’S MOTION IS PREMATURE AND MUST BE DENIED.

In accord with the legal requirements of Chapter 91, Haw.Rev.Stat. (Hawaii’s Administrative Procedures Act or HAPA), parties to a “contested case” proceeding are entitled to a full evidentiary hearing if their interests may be adversely affected by a final ruling in an administrative proceeding. Hawaii case law on the manner in which an administrative agency deals with procedures regarding parties to a contested case proceeding requires due process at each and every stage. [Refer, Ka Pa’kai O Ka’Aina v. Hawaii Land Use Commission, 94 Haw. 31; P 3rd 1068 (2000)].

[A]ll parties shall be afforded an opportunity for hearing, after reasonable notice.

(Section 91-9 (a), Haw.Rev.Stat. Also, refer Application of Kauai Electric, Division of Citizens Utilities, Co. 60 Haw 166; 590 P 2nd 524.

In this proceeding, no party has yet been heard. In fact, the hearing has yet to be scheduled. All that has occurred up to this point in time is discovery and the submittal of proposed testimony, which has yet to be received into the evidentiary record. It would be fatally premature for the Commission to determine at this stage of the proceeding what contributions, if

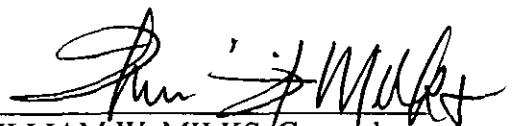
any, County of Maui may make to the evidentiary record. It is that record – and not the record established to date – that is the sole basis for the requisite findings of fact and conclusions of law the Commission must make. For example, County has represented to the Commission that MPUI is non-compliant with federal, state, and county water quality statutes, rules, and regulations. That allegation can be documented in later legal pleadings, albeit not in evidence to be cross-examined, in as much as the County may have lost its opportunity to present exhibits in the evidentiary hearing.¹ In summary, it not only would be premature for the Commission to act favorably on MPUI's Motion, if the Commission were to grant the Motion, it would jeopardize the legal sustainability of MPUI's final Decision and Order in this proceeding.

4.0 SUMMARY.

Based on the foregoing factual points and legal authorities, WMA urges the Commission to deny MPUI's Motion to Dismiss County of Maui as an Intervening Party to this proceeding. MPUI's motion is absent good cause, premature, and speculative. To grant the motion at this juncture in the proceeding would constitute reversible legal error.

DATED: Honolulu, Hawaii, February 11, 2010.

Respectfully Submitted,


WILLIAM W. MILKS, Counsel
for West Molokai Association

¹ COM represented in its January 13, 2010 filing that it "intends to establish, through cross-examination of witnesses and exhibits" that MPU's water service does not comply with the law. Presumably, MPU witness O'Brien will be subject to cross-examination by COM on water quality. If O'Brien is unqualified or unknowledgeable, MPUI does run the risk of failing to meet its burden of persuasion in this proceeding, in as much as MPUI has provided only one witness (i.e. O'Brien) to support MPUI's proposition that its water service is fully compliant with the law.

CERTIFICATE OF SERVICE

The requisite number of copies of the foregoing “West Molokai Association’s Memorandum of Points and Authorities in Opposition to Molokai Public Utilities, Inc.’s Motion to Dismiss County of Maui as an Intervenor,” are to be served by U.S. Mail, with prepaid postage, or to be hand-delivered, as indicated, the same date as filing the original, plus eight copies, with the Commission.

Dean K. Nishina
Department of Commerce and Consumer Affairs
Division of Consumer Advocacy
P.O. Box 541
Honolulu, Hawaii 96809

BY HAND

Margery S. Bronster, Esq.
Jeannette H. Castagnetti, Esq.
Bronster Hoshibata
2300 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813

BY HAND

Michael H. Lau, Esq.
Yvonne Y. Izu, Esq.
Sandra L. Wilhide, Esq.
Moriwara Lau & Fong LLP
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813

BY HAND

Andrew V. Beaman, Esq.
Chun Kerr Dodd Beaman & Wong
745 Fort Street, 9th Floor
Honolulu, Hawaii 96813

BY HAND

DATED: Honolulu, Hawaii, February 11, 2010.



WILLIAM W. MILKS, Attorney for Applicant
Molokai Public Utilities, Inc.